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Carl Johanson and Clara J. Johanson v. Cudahy Packing Company : Reply Brief of Respondent in Support of Petition for Rehearing

Utah Supreme Court

6302

In the
Supreme Court of the State of Utah

CARL JOHANSON and CLARA J. JOHANSON, his wife,
Plaintiffs and Appellants,

vs.

CUDAHY PACKING COMPANY,
Defendant and Respondent.

Case No. 6302

Respondent's Reply Brief in Support of Petition for Rehearing

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I.

WHEN THE PLAINTIFFS CLAIMED AND WERE AWARDED COMPENSATION FROM THE INSURANCE CARRIER THEY PRECLUDED THEMSELVES FROM OBTAINING ANY VESTED RIGHT OF THEIR OWN TO RECOVER DAMAGES FROM THE DEFENDANT.

Upon the death of Robert Johanson whatever, if any, action he had for wrongful injury died with him. Prior

to the amendment of Section 5 of Article XVI of the Utah Constitution (Nov. 2, 1920), and the enactment of the Workmen's Compensation Act, the heirs of the deceased, or his personal representative for the benefit of his heirs, had a right to maintain an action against any person who had wrongfully or negligently caused the death of Johanson (see Sec. 6505 of the Compiled Laws of Utah, 1917). This statute, as a part of the Code of Civil Procedure, provided such a remedy, with the consequent right which resulted from that remedy so provided. The action thus created was purely statutory and entirely unknown to the common law.

Platz v. International Smelting Co., 61 Utah, 342; 213 Pac. 187 (1923)

In this Platz case the Court said:

> "The cause of action here in question being purely statutory, it must necessarily follow that whenever the legislature has designated the agency authorized to enforce such right, its enactment precludes any other agency from enforcing the right or appealing to the courts for redress."

Thorpe v. Union Pacific Coal Co., 24 Utah, 475; 68 Pac. 145 (1902)

But Robert Johanson's death occurred on June 3, 1938. On that date and ever since June 26, 1933, when the Revised Statutes of Utah, 1933, took effect, Section 104-3-11 of the Revised Statutes of Utah, 1933, (formerly Section 6505 of the Compiled Laws of 1917) by its express terms excepted such a case as this from its operation, and this Johanson case was and is controlled by Section 42-1-58 of the Revised Statutes of 1933.

Under Section 42-1-58 of the Revised Statutes of 1933, upon the death of Robert Johanson on June 3, 1938, the plaintiffs, his dependents, had no *vested* rights. They had a choice of two remedies: (1) compensation from his employer or its insurance carrier, or (2) an action to recover damages against defendant. When these dependents claimed and were awarded compensation they could not thereafter institute or maintain in their own right the action to recover damages against defendant. Their *acquisition* of the right to collect compensation precluded their *acquisition* of the right to recover damages. When they obtained the award of compensation their rights were in all respects the same as if Section 42-1-58 had expressly provided that their remedy of compensation was alone and by itself an *exclusive one.* The fact that these dependents might receive some part of a judgment, if one was obtained by the insurance carrier from defendant, did not vest in these dependents any interest in the action which said dependents declined to take.

The plaintiffs, appellants here, in their brief contend that they, independent of any assignment by the insurance carrier, have an interest in the action against the defendant; that this interest was vested in them at the time of the death of Robert Johanson. This was their theory at the time they were in the Federal Court in their first suit for $50,000, and it has been at all times their theory in this second suit for $2950. The plaintiffs' claim that the insurance carrier made a waiver of its right to subrogation and an assignment of its cause of action against the defendant is not primary but at most merely secondary; a sort of an anchor to the windward; a last extremity.

That such is the contention of the plaintiffs is manifest from their brief lately filed in this rehearing proceeding, and the cases cited in such brief from Nebraska and Minnesota. Those authorities are as follows:

Thomas v. Otis Elevator Co., 103 Neb. 401; 172 N. W. 53 (1919)
Hugh Murphy Construction Co. v. Serck, 104 Neb. 398; 177 N. W. 747 (1920)
O'Donnell v. Baker Ice Mach. Co., 114 Neb. 9; 205 N. W. 561 (1926)

In their opening brief the appellants cited *Muncaster* v. *Graham Ice Cream Co.*, 103 Neb. 379; 172 N. W. 52 (1919).

For the purpose of giving a true viewpoint of the Nebraska law, the defendant cites:

Luckey v. Union Pacific R. R. Co., 117 Neb. 85; 219 N. W. 802 (1928)
Bronder v. Otis Elevator Co., 121 Neb. 581; 237 N. W. 671 (1931)
Goers v. Goers, 124 Neb. 720; 248 N. W. 76 (1933)
Graham v. City of Lincoln, 106 Neb. 305; 183 N. W. 569 (1921)

On Page 14 of plaintiffs' brief they pretend to quote the Nebraska statute, but they do not quote that statute in full. If they had read the statute instead of some case which quotes only in part, they would have found that as early as 1913 it provided:

> "*Where a third person is liable to the employee or to the dependents, for the injury or death,* the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not

be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation." (Italics ours) (Omitted from Plaintiff's Brief)

(C. 198, Sec. 18, Laws of Nebraska, 1913. This section was Sec. 3659 of the Revised Statutes of 1913 and 3041 of the Compiled Statutes of 1922.)

In 1929 the legislature of Nebraska, in order to make its intent clear, added the following proviso:

"Provided, however, that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against said third person in his own name or in the name of the personal representative based upon said liability, but in such an event an employer having paid or paying compensation to the said employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid. Comp. St. 1929, Sec. 48-118."

(C. 135, Laws of Nebraska, 1929, or Sec. 48-118 of the Compiled Statutes of 1929.)

Plaintiffs cite the following Minnesota cases:

City of Red Wing v. Eichinger, 163 Minn. 54; 203 N. W. 622 (1925)

McGuigan v. Allen, 165 Minn. 390; 206 N. W. 714 (1925)

And for the purpose of giving a true viewpoint of the Minnesota Law, the defendant cites:

Fidelity Casualty Co. v. St. Paul Gas Light Co., 152 Minn. 197; 188 N. W. 265 (1922)

Guile v. Greenberg, 192 Minn. 548; 257 N. W. 649 (1934)

Dale v. Shaw Motor Co., 205 Minn. 99; 287 N. W. 787 (1939)

Gleason v. Sing, ____ Minn. ____; 297 N. W. 720 (1941) (Not yet officially reported)

Gile v. Yellow Cab Co., 177 Minn. 579; 225 N. W. 911 (1929)

In view of the fact that the statutes of Nebraska and Minnesota have statutory enactments similar in some respects to those of the State of Wisconsin, defendant cites:

Swanson v. Lake Superior Ry. Co., 195 Wis. 633; 219 N. W. 274 (1928)

Employers' Mutual Liability Ins. Co. v. Icke, 225 Wis. 304; 274 N. W. 823 (1927)

London Guarantee & Accident Co. v. Wisconsin Public Service Corp., 228 Wis. 441; 279 N. W. 76 (1938)

Standard Surety Co. v. Spewackek, 233 Wis. 158; 288 N. W. 758 (1939)

(Under the Minnesota statutes, third persons engaged in the furtherance of common enterprises or purposes with those of the employer may come within the Workmen's Compensation Act. "There is no statute in any other state similar to the last paragraph above quoted." *Gile* v. *Yellow Cab Co.*, supra.)

It ought to be a sufficient answer to the plaintiffs' contention, that they have an interest in the action against the defendant in their own right, and not as assignee, to

point out that the decisions from the States of Minnesota and Nebraska are based upon statutes quite different from those in force in the State of Utah. These Minnesota and Nebraska cases make clear why the defendant is right in contending that the plaintiffs, by claiming and obtaining an award of compensation, under the Utah Statute *cut themselves off from acquiring a right to sue the defendant for damages,* and why the insurance company, "having paid the compensation" thereby could become vested in its own right, not as an assignee, to sue for such damages.

Counsel for plaintiffs have throughout this entire litigation cited cases from other states without any apparent realization of the importance of the fact that a difference in statute results in a difference in decision. It is believed that an examination of the cases above cited will create a desire in the mind of every member of this court to avoid the difficulties that have been encountered by the courts of Nebraska, Minnesota and Wisconsin in applying and construing their laws providing for workmen's compensation.

It should be noted that in Minnesota the action for death by wrongful act is by statute a survival of the action for personal injury (see Sections 9656, 9657, Minnesota Revised Statutes), and that only the personal representative of the deceased may sue. In the States of Nebraska and Wisconsin causes of action for personal injuries have been assignable for many years, even long prior to the enactment of compensation laws.

In the case of *Hugh Murphy Construction Co.* v. *Serck,* 104 Neb. 398; 177 N. W. 747 (1920), the Nebraska Court said:

> "There is no provision in the Nebraska statute, as in those of some states, requiring the injured employee to elect between claiming compensation under the statute and an action for damages against the negligent third party. The following cases support our conclusion:"

The court then cites:

> McGarvey v. Indepenent Oil & Grease Co., 156 Wis. 580; 146 N. W. 895 (1914)

In Wisconsin causes of action for injuries survive, and for that reason are held to be *property rights.* (See McGarvey case.)

> Lehmann v. Deuster, 95 Wis. 185; 70 N. W. 170; 37 L. R. A. 333 (1897)

In this Lehmann case, cited in defendant's opening brief for rehearing, it was held that if the cause of action survived it was assignable, and the McGarvey opinion says:

> "Thus it will be seen that an ordinary claim for damages for a tortious injury to the person, notwithstanding it was otherwise at common law, is a *property right* which may pass by assignment or operation of law, with the incidental right to a judicial remedy, by and in the name of, the real party in interest, to enforce it." (Italics ours)

(This supports the defendant's definition of a property right.) (See opening brief, P. 67.)

In Minnesota it has been said that it is an open question whether the contributory negligence of a workman who has received compensation from his employer can be asserted by a third party as a defense when sued by the employer to recover the amount of compensation paid (186 N. W. 863; 246 N. W. 528); but in that state it was held

by a divided court that the third person might assert the employer's contributory negligence as a defense (246 N. W. 527). On the other hand, the Supreme Court of Nebraska held that the employer's contributory negligence could not be asserted as a defense by the third person.

There are other differences which might be pointed out, but in the main Nebraska, Minnesota and Wisconsin stand somewhat by themselves. Although it is somewhat difficult to state, it is believed that the plan of those states may be stated as follows:

If the death of an employee is caused by the wrongful act of a third person, a cause of action *vests immediately* in the surviving and designated beneficiaries of the deceased. The third person, wrongdoer, is in the language of the statute "liable" to the dependents who have been damaged by the death of the employee. (Sec. 48-118 Neb. Statutes, 1929.) The Compensation Act does not disturb or affect this liability. (Of course, if it deprives the third person of the defense of contributory negligence, then to that extent the preceding statement is inaccurate.) The beneficiaries designated by the statute may have compensation from the employer, and they may also have damages from the third person. In the language of the Red Wing case (203 N. W. 622), "he (referring to the injured employee) could pursue both." No election is required in either Minnesota or Nebraska. (Excepting common purpose statute of Minnesota.)

In the language of the Supreme Court of Minnesota (*Gleason* v. *Sing*, supra), "the third party liability has for its basis tortious conduct on the part of one who is not the employer resulting in harm to the injured workman. The

amount of recovery is measured by the common law standard of damages" (except where the third person and the employer are co-operating to a common purpose.)

And again:

> "The employer's liability under the Compensation Act on the other hand is not based upon negligence but depends upon whether the workman suffered an injury caused by the accident arising out of and in the course of his employment."

And again:

> "We think it is apparent that the present Act recognizes and preserves the common law liability resting upon a third party's negligence in cases of this nature. Therefore, the receipt of compensation by the injured employee does not deprive him of his right of recovery upon the facts here shown."

The taking of compensation in Minnesota or Nebraska is not a surrender of the vested right to damages; (*nor is it a refusal of an inchoate proffered right, as it is in Utah*). If the beneficiaries take compensation from the master or the insurance carrier, and thereafter recover damages from the third person, the master or insurance carrier has in effect a lien on the judgment for damages to the extent of the compensation that has been paid by the master or insurance carrier. If the master or insurance carrier sues and recovers, he then keeps out of the amount recovered the compensation that has been paid and the expenses incurred in the litigation. If the designated beneficiaries or dependents sue, the master or insurance carrier can make himself or itself a party, and thereby protect the interest that it has acquired by paying com-

pensation. (These rights as against the third person are property rights, not in any quasi-contractual sense nor at common law, but because of the survival statutes. (146 N. W. 895, supra.)

The *primary* purpose of these statutes in the States of Nebraska, Minnesota and Wisconsin is to protect the employee in case of injury or his dependents in case of death. They have an *incidental* purpose of protecting the employer or insurance carrier if any recovery is had from the third person who wrongfully causes injury to or death of the employee. The master is relieved of all liability for negligence, and at the same time he is compeled to pay compensation, even though such master is guilty of no fault. The employer or insurance carrier, in the prosecution of the action against the third person, stands in the shoes of the employee. (279 N. W. 76, supra.)

The Utah plan is basically entirely different from that prevailing in Minnesota, Nebraska or Wisconsin.

Hunt v. Bankline, 35 Fed. (2d) 136 (1929)
Bruso's Case, 295 Mass. 531; 4 N. E. (2d) 308 (1936)
Lang v. Brooklyn City R. Co., 217 N. Y. S. 277 (1928)
Lang v. Brooklyn City R. Co., 247 N. Y. 551; 161 N. E. 178 (1928)
Orange City Ice Co. v. Texas Compensation Ins. Co., 278 Fed. 8 (5 C. C. A.; 1922)

Some of these and many other cases which might be cited are predicated *upon statutes which do require an election on the part of the injured employee or his dependents in case of his death.* Such statutes are in direct contrast to those of Nebraska and her associates, Wisconsin

and Minnesota. Under these statutes, when the dependents make an election to take and are awarded compensation, then they never obtain or acquire a right to sue the third person, wrongdoer. This right is not *transferred* from them but it is never *acquired* by them. The insurance carrier, when it sues, sues in its own right, and not as an assignee, statutory or otherwise. (278 Fed. 8; 65 Fed. (2d) 650). It cannot be an assignee, without an assignor.

In Utah, upon the death of an employee, if it is caused by the wrongful act of a third person, the right to recover does not *vest* until there has been an election by the dependents of the deceased. They may at their option have compensation from the master or insurance carrier, or they may have their action for damages against the third person. (Sec. 42-1-58.) This is one part of the statute that needs no construction or interpretation. If counsel for plaintiffs is looking for "the intent of the legislature" (appellants' brief, P. 9), then here he may find it without suffering from a laborious study of common law actions and common law pleadings. Even a perusal of the Code will be unnecessary.

This plain provision can be amended by the legislature and the injured employee or his dependents may by such amendment be granted both compensation and damages, but no amount of "social and economic adjustment" (plaintiffs' brief, P. 11) can avoid its effect on the mind of an honest man, whether he appears in behalf of an insurance company, a packing company, or some other person more or less fortunate.

Under this Utah plan the dependents cannot take the

benefits of compensation from the master and then the benefits of the action for damages against the third person. Emphatic but ill-timed assertions about "gross negligence" (plaintiffs' brief, P. 11) cannot properly influence anyone to disregard an open-eyed election by dependents, advised as they were by unusually zealous and public-spirited counsel.

In the absence of fraud on the part of the defendant, the election of the plaintiffs stands. Even fraud on the part of the insurance carrier does not avoid an election to take damages.

> Tews v. C. T. Hanks Coal Co., 267 Mich. 466; 255 N. W. 227 (1934)

This case is but a partial illustration of the effects of a traffic in compensation rights so ardently defended by counsel for plaintiffs (Plaintiffs' brief, P. 11). It seems that the insurance carrier was making an "economic adjustment." In so doing it perpetrated a fraud on an employee who was suffering from the amputation of a leg. By false promises this insurance carrier induced the injured man to accept $2000 from a railroad corporation who had injured the employee at a railroad crossing. After the plaintiff had received the $2000, he filed an application for compensation from his employer, as he had been told by the insurance adjuster he might do. The Compensation Board held that the representations made by the insurance carrier prevented the application of the statutory rule otherwise following an election; but the Supreme Court of Michigan was compelled to deny compensation, saying in part:

> "The Compensation Law is in derogation of the common law, and therefore its measure of relief

may not be extended beyond its express terms; it is a legislative creation permitting no enlargement by principles of equity or common-law adaptations. It is arbitrary, and, where it speaks, nothing can be added nor changed by judicial pronouncement. It imposes liability upon operatives under its provisions and measures exclusive relief in its own terms. This law permits an employee, injured in the course of his employment by the negligence of a third party, to have compensation from his employer or from the third party, but not from both. The employee may elect his remedy, but cannot, even by agreement with the employer, have remedy in part from the third party for a tort and in part against his employer under the Compensation Law. The remedy against the third party is at common law and that under the Compensation Law wholly foreign to the common law. The two laws bear no relation, and their remedies cannot be mixed, except by express statutory authority. Remedy had under one wholly excludes the employee from the other.

"The statutes of some states permit proceedings against both the employer and the negligent third person, but double recovery is not permitted."

If the brief of counsel for defendant has not convinced this Court that the plaintiffs are seeking in the instant case to recover in their own right and not as assignees of the insurance carrier, then it is submitted that the brief filed by the plaintiffs will have that effect. The plaintiffs do not rely upon or defend the so-called "assignment." By their silence they admit that subrogation is not assignment. They did not allege payment of the award of compensation, first, because the award itself would disprove payment, and, second, because on the theory of plaintiffs,

the award paid or unpaid is immaterial. It, according to the plaintiffs' theory, is of no concern either to the defendant or to the courts.

It is submitted that if the legislature of this state had intended the dependents of a deceased employee to have the right to compensation, and then conjunctively and at the same time have the right to recover damages from the third person who negligently caused the death of the employee, "it would have been easy to say so," instead of providing in express terms for an election by the dependents as to these alternative remedies; and because the legislature did not "say so," rational individuals are compelled to conclude that it did not intend that either the injured employee, or his dependents in case of death, should have a double recovery. ("Easy to say so" has become a rule of construction.)

II.

THE SUBROGATION OF THE MASTER OR ITS INSURANCE CARRIER TO THE RIGHT OF ACTION TO SUE FOR DAMAGES CANNOT TAKE EFFECT UNDER THE STATUTE UNTIL THE AWARD OF COMPENSATION HAS BEEN PAID. SUCH SUBROGATION DOES NOT CHANGE THE CHARACTER OF THE ACTION FOR WRONGFUL DEATH FROM ONE THAT IS NON-ASSIGNABLE TO ONE THAT IS ASSIGNABLE. THE CHARACTER OF THE LIABILITY OF THE THIRD PERSON IS NOT AFFECTED BY THE STATUTE PROVIDING FOR SUBROGATION.

It is believed it has been established that no right ever

vested in the plaintiffs to institute or maintain this action, and consequently no right was ever transferred from them by the statute. One cannot give up or have taken from him that which he never had.

Plaintiffs cite in their brief *City of Red Wing* v. *Eichinger*, 163 Minn. 54; 203 N. W. 622 (1925). In that case the city carried compensation insurance with the Travelers Insurance Company. A streetsweeper was injured. He applied for and received an award of compensation, and the insurance company paid that compensation. The city then brought suit against Eichinger, claiming that the injury of the streetsweeper was due to the negligence of the defendant. The statute of Minnesota recognized the insurer as such. In this respect it is like the statute of Utah. The statute providing for subrogation, however, was different because it provided for a subrogation when the employer has paid *or has obligated* himself to pay an award of compensation.

The Court held that the city was not obligated to pay anything and had paid nothing, and consequently it could not maintain the action. In so deciding the Court said:

> "A statutory subrogation has the same characteristics as if it were a creature of equity. It is enforced solely for the purpose of accomplishing the ends of substantial justice, and does not depend upon any contractual relation between the parties."
>
> Henderson Tel. & Tel. Co. v. Owensboro Tel. & Tel. Co., 192 Ky. 322; 233 S. W. 743 (1921)

In the Kentucky case there had been an award of compensation to an injured employee and that award had been

paid by the insurance carrier. The statute of Kentucky provided as follows:

> "The employer, having paid the compensation or having become liable therefor, shall have the right to recover in his own name."

It was held that the statute gave no right of action to the insurance company, and that the employer, not having paid or become liable to pay, could not bring and maintain the action.

It is quite clear from the Kentucky case that without the aid of a statute the insurance company would have no equitable ground for subrogation. The insurance company is in the indemnity business and accumulates a large fund by the collection of premiums, and when it pays it appropriates from such fund such part as is necessary in the given case to satisfy the award. It has lost nothing whatever. (Such was the reasoning of the Kentucky Court.)

But the Utah statute recognizes the right of the insurance carrier to recover. That right cannot be disputed, providing the insurance company complies with the condition precedent stated in the statute. The insurance carrier must have paid the award before it can become vested with the right of action.

> Broderick v. Puget Sound Traction Light & Power Co., 86 Wash. 399; 150 Pac. 616 (1915)

In that case it appeared that an automobile belonging to the plaintiff had come into collision with a freight car owned by the defendant company. Her automobile was fully repaired by the Broadway Automobile Company, whose

duty it was to take care of such automobile. No insurance was ever paid by the insurance carrier and the plaintiff paid out nothing for the repairs. The plaintiff undertook to contend that she was a trustee of an express trust, and when that contention failed she contended that the defendant was not in a position to object to the action being prosecuted in the name of the appellant, but the Supreme Court of Washington said that her automobile having been fully repaired, she had no right to compensation from the person causing the injury. Therefore the dismissal of the trial court was affirmed.

Employers' Liability Assurance Corp. v. Indianapolis C. & T. Co., Ind. App., 139 N. E. 200 (1923)

This case involved an elective statute, in the elective respect not unlike that of Utah. It was held that if the employee elected to take compensation and accepted payment from his employer, he thereby surrendered whatever right of action he had to recover from the person whose negligence caused his injury.

The Indiana statute provided:

> "and if compensation is awarded and accepted under this Act, the employer having paid the compensation, or having become liable therefor, may collect", etc.

Under the policy of insurance carried by the employer the subrogation did not take place until the insurance carrier had paid, and it was held that the insurance company's right of action "did not accrue until the compensation had been paid."

Now, it will be noticed that these statutes from other states permit subrogation to take place when the insurance carrier has become obligated to pay, but in Utah the insurance carrier does not become subrogated until it has paid the compensation awarded. The law seems to be well settled that if these beneficiaries should die before the award made in this case had been fully paid, then all installments that had become due and payable during the lifetime of the beneficiaries would belong to their estate, but that as to installments yet to become due after their deaths, neither the insurance company nor the employer would be required to pay the same.

There is some apparent conflict in the holdings of the courts of various states, but such apparent conflict is due to a difference in the survivorship statutes of those states.

Tierney v. Tierney & Co., 176 Minn. 464; 223 N. W. 773 (1929)

In this case the Supreme Court of Minnesota said:

> "That the right" (to compensation) "is purely statutory and does not extend beyond the life of the beneficiary unless the statute so provides; that the right, being non-assignable, does not survive to others at death; that it grew out of the contract of employment, is in lieu of wages, is personal like the contract of employment, and is terminated by death, as that would have terminated the contract out of which it grew; that it is intended for the personal benefit of the beneficiary, and is not a vested right nor transmissible to others, and that, the statute having specified the rights granted to dependents, they possess only those so specified."

See also 51 A. L. R., 1446 for a collection of the authorities upon this subject.

It is believed it may be assumed in this case that it will be impossible to determine the loss of the insurance carrier except upon full payment of the award, but the insurance carrier in this case does not allege that it has paid anything, and under the statute it cannot acquire any cause of action until it has paid in full, or until for some reason it has been discharged of any further obligation to pay.

For the purpose of argument, however, and for that purpose only, let it be assumed that the subrogation has become complete. That subrogation did not come about by virtue of any contract, but it resulted solely from and because of the statute, and in the language of the Red Wing case, it had all the characteristics of an equitable subrogation. When that subrogation takes place, then the character of the third person's liability is not changed or altered in the slightest respect. The insurance carrier then recovers upon only the cause of action to enforce the liability in tort for negligently killing the deceased. That is the only basis of the action which the insurance carrier is given the right to maintain. (279 N. W. 78, supra.)

If the cause of action against the third person is a property right, i. e. if it survives in favor of the estate of the person damaged and against the estate of the wrongdoer, then it is assignable, and this is true independent of the existence of Section 42-1-58. The enactment of that section did not provide for assignability or survivability.

The situation is the exact opposite of *McGarvey* v. *Independent Oil & Grease Co.*, 156 Wis. 580; 146 N. W. 895 (1914). In Wisconsin causes of action for personal injuries are property, i. e. they survive and have been made to survive from a very early date. The plaintiff McGarvey

was injured. He applied for and obtained compensation from his employer. That compensation was paid and then the employer assigned its claim against the wrongdoer to the plaintiff. The question arose as to the assignability of the cause of action, and the Court said:

> "Before its enactment" (referring to the statute) "the employer could purchase an employee's claim for damages against one who had wrongfully injured him in his person or his property, and enforce it in his own name. In such a case the amount paid for the claim would not militate, necessarily, against its enforceability, or the measure of the recovery, or in any way affect the claim as to assignability. The letter of the statute, as well as its purpose, seems to be that, in case of a compulsory purchase of such a claim the nature of it shall not at all be changed."

It was held that because the claim was assignable before the Workmen's Compensation Statute was passed, it was assignable after that event. The Compensation Statute did not destroy its assignability, nor did it create that assignability.

It is submitted that the plaintiffs here, by reason of the fact that they applied for and received an award of compensation, never acquired any cause of action against the defendant; that the insurance carrier has not yet acquired such cause of action because it has not paid the award, and when the subrogation is complete, and not until then, the insurance company will have acquired a cause of action against the defendant if the defendant wrongfully and negligently caused the death of the deceased; that the statute providing for this subrogation does not provide for any as-

signment, and that the subrogation does not change the character of the cause of action.

III.

THIS COURT HAS NO POWER TO REVERSE THIS JUDGMENT MERELY TO PERMIT THE PLAINTIFFS TO AMEND THEIR COMPLAINT.

Article VIII of the State Constitution vests the judicial power of this state in the senate, sitting as a court of impeachment, in a supreme court, in district courts and in justices of the peace, and then it provides for the legislative creation of such other courts as may from time to time be established.

Section 4 of Article VIII grants this court original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. It then provides:

> "In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction."

In Section 9 of Article VIII it is provided as follows:

> "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. *In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone.*" (Italics ours)

Section 104-41-1 of the Revised Statutes of Utah, 1933, among other things provides:

> "The appeal shall be upon the record made in the district court. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone."

(Of course the statute was of necessity in accord with the Constitution.)

Even prior to statehood the Supreme Court of the Territory of Utah had no power to review and decide questions of fact in law cases, and matters not urged in the court below could not be first urged on appeal.

Mr. District Judge Pratt, speaking as a member of this court, set forth the law upon this subject with absolute accuracy in 1919.

> Valiotis v. Utah-Apex Mining Co., 55 Utah, 151; 184 Pac. 802 (1919)

He wrote the opinion in the case cited, and among other things said:

> "But as the right or power to review and decide controverted questions of fact on appeal in law cases did not exist prior to statehood and did exist, as now by constitutional provision, in equity cases, the constitutional restriction of appeals in law cases to the review of questions of law alone was probably intended to preserve this distinction without material change." (184 Pac. 807)

Without further citation of authority, and because the provision of the Constitution itself is sufficient, it can be said that this court in this action at law has appellate jur-

isdiction and that only. In the exercise of that jurisdiction it can decide only such questions of law as are presented upon appeal. Assignments of error are necessary to invoke the jurisdiction of the court. Only matters challenged by appeal and assignments of error are presented for review.

> "This court is not authorized, either by statute or rules of the court, to review any ruling of the district court unless error is assigned designating or specifying the alleged error."
>
> Perrin v. Union Pacific R. Co., 59 Utah 1, 201 Pac. 405 (1921)

(This quotation is from Page 411)

The only question of law that is presented, or that can be involved in this case, cannot be stated otherwise than as follows: Does the complaint state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendant?

If this question must be answered in the negative, as it seems that it must be, then the judicial controversy between the plaintiffs and the defendant is ended and is beyond debate.

> Von Drachenfels v. Doolittle, 77 Cal. 295; 19 Pac. 518 (1888)

What is a question of law except an issue of law; a matter of law in dispute? The demurrer in this case presented that issue of law to the trial court. For the purposes of the demurrer it conceded all facts well pleaded in the complaint. It was then contended by the defendant that on the facts pleaded in the complaint there was no cause of

action. The trial court sustained that contention, and thereby decided the only issue at law that has ever existed in this case. If the plaintiff had asked leave to amend, and the trial court had denied that request and the plaintiffs had appealed and assigned that denial of the right to amend as error, then this Court would have had before it a question of law which would have involved a review of the trial court's discretion. The question would have been: Did the trial court abuse its discretion in denying the right to amend?

But the trial court did not deny the plaintiffs a right to amend their complaint. On the other hand, the trial court affirmatively granted leave to amend and the plaintiffs refused to amend. That is the record in this court.

When the plaintiffs refused to amend, after waiting the statutory time the trial court entered judgment for the defendant.

Then the plaintiffs appealed and the error assigned was that the trial court erred in sustaining the demurrer of the defendant. This record presents no other question of law than that presented by the plaintiffs, appellants here.

The matter of amendment of the complaint was for the District Court. It was a matter within that court's discretion. Of course, that court could not abuse its discretion and that court did not, because it allowed the plaintiffs to amend and the plaintiffs refused to amend. The District Court did not commit any error in entering judgment for the defendant. The only possibility of error on the part of the District Court was that of sustaining the demurrer. As

long as the District Court adhered to that ruling, then upon the refusal of the plaintiffs to amend, the District Court could not do otherwise than enter judgment for the defendant.

Let it be assumed for the purpose of argument, and for that purpose only, that the plaintiffs' counsel made a mistake in refusing to amend (they did not), and that such mistake was one from which relief could be obtained under Section 104-14-4, Revised Statutes of Utah, 1933, as amended by Chapter 121 of the Laws of Utah, 1939. It would be an extreme case, but the writer can conceive of such a case. It will likely never happen.

Suppose, for instance, that there was collusion between counsel for defendant and counsel for plaintiffs and that the plaintiffs' counsel was not true to his clients, and for that reason deliberately and dishonestly refused to amend, then, perhaps, the plaintiffs could get new counsel and make proof of the fact of collusion, tender an amended complaint, ask the court to set aside the judgment, and allow the complaint to be filed. This, of course, would require a showing of diligence on the part of the plaintiffs and the facts would be determined by the trial court. Under the section just referred to it is believed that the trial court would have jurisdiction to grant the proper relief, and if the trial court did not grant it, then an appeal could be taken and the matter presented to this court as a question of law.

Upon what would the jurisdiction of the trial court depend? Under the section above referred to the applica-

tion for relief must be made within a reasonable time "not exceeding ninety days after the making or occurrence of the judgment, order or other proceeding sought to be relieved from." That is the language of the statute, and unless the application was made within ninety days the District Court would have no jurisdiction.

The judgment in the case at bar was made and entered on the 17th day of May, 1940. No application for relief was made to the District Court, and the appeal from the judgment was taken to this court 87 or 88 days after the entry of the judgment in the district court. The date of the appeal was August 13, 1940, and in this court no assignment of error has been made, or could be made, involving the right of the plaintiffs to amend, because they were given that right by the trial court, and refused that right. At no time have counsel for plaintiffs asserted that plaintiffs should be allowed to amend, and the compensation award, a certified copy of which has been presented to this Court for the purpose of showing that no amendment could be made, does show that no amendment can be made.

City of Durango v. Luttrell, 18 Colo. 123; 31 Pac. 853 (1892)

Quotation from a unanimous opinion of the Colorado Court:

> "To justify the reversal of a judgment rendered in a civil action by a court having jurisdiction of the subject-matter and the parties, the record brought to this court for review must disclose—*First*, some manifest error affecting the substantial rights of the party seeking such reversal; *second*, such error must appear either in the record proper, or, if committed in respect to some interlocutory or-

> der, ruling, or decision, not a part of the record proper, the same must have been brought to the attention of the trial court in such apt time and manner as to afford opportunity for correction, and the record of such error must be regularly preserved by bill of exceptions or otherwise; and *third,* the matter relied on for reversal must be duly assigned for error upon the record brought to this court."

See also In Re Kingsley's Estate, 93 Cal. 576; 29 Pac. 244 (1892)

Quotation from California Supreme Court:

> "With the process of reasoning by which the court reached its conclusion we have nothing to do. That may have been erroneous and the ruling correct. To justify a reversal, it is incumbent upon the appellant to show an erroneous ruling, and not merely bad reasoning or mistaken views of the law."

2 Encyc. of Pleading and Practice, Pages 499-507

CONCLUSION

In conclusion let it be said that to the writer of this brief it seems certain that this Court has no power to reverse a judgment as a mere matter of grace (ex mera gratia). The Constitution created the court. It stated that court's jurisdiction, and it submitted that the court cannot lawfully assume any greater jurisdiction than that granted by the Constitution, viz.: to determine the only question of law presented by the record. The appellants raised the only question of law that is possible from that record. If

that question is decided against the appellants, then it is submitted that the judgment must be affirmed.

Respectfully submitted,

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